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CONSTRUCTION OF PHRASE "ARISING OUT OF THE EMPLOYMENT" IN COMPENSATION ACT CASES, WHERE THE ACTION IS SUPER-INDUCED BY NATURAL CAUSES.

Probably no set of words in the compensation acts, or in any other statute for that matter, is likely to give rise and has already given rise to more litigation than the phrase "arising out of the course of employment." The refinements possible in construing these words are almost infinite and the field of discussion is attracting the metaphysicians and other word twisters until the ordinarily clear thinker is almost prepared to admit the need of a strait jacket and a padded cell.

To begin with let us consider an early case often cited and likely to be regarded as a leading case; to-wit, the case of Warner v. Couchman, L. R. (1911), 1 K. B. 351, 1 Negligence and Compensation Cases Annotated 51.

The facts in this case were exceedingly simple. A driver of a bakery wagon, while delivering bakery goods to retail customers on a very cold day, suffered severe and permanent injury to his right arm by reason of having it frostbitten. It appeared that this particular arm suffered the injury by reason of the driver being compelled to pull off his glove at frequent intervals to make change for the customers.

The main question over which much gray matter was expended was whether this accident arose "out of and in the course of the employment." There was, of course, no doubt that the accident arose "in the course" of the employment, but after much labored reasoning, as it appears to us, the Court of Appeals finds that the particular accident did not arise "out of" the employment, simply because the injury suffered was one to which a large section of the population, whose occupation is out-of-doors, is ordinarily exposed.

If this reasoning is to be accepted by the courts in this country, then, indeed, will the great and beneficent purposes of the Workmen's Compensation Acts be defeated. For the great underlying sociological idea in such legislation is to require the master directly and society indirectly to compensate such servants who, by reason of their employment, are subjected to unusual hazards and who while thus serving their masters and society suffer an injury which it is not fair nor just that they should bear alone.

Surely it is not a proper argument against a servant's claim for compensation that other servants in other employments are exposed to the same hazards, at least not if such hazard is increased by reason of the peculiar nature of the employments.

The dissenting opinion of Lord Justice Fletcher Moulton, in the Warner case, is so clear and convincing that we venture the following quotation, which is worthy of being carefully considered by the courts when confronted with a question of this character. Justice Moulton said:

"The judgment of the learned judge of the County Court shows that he thought himself permitted, and even bound to compare the man's employment with other employments in order to ascertain whether the accident arose out of the applicant's employment. To my mind this is *falsa demonstratio*. The law does not say 'arising out of his employment and out of that employment only.' Other employments have nothing whatever to do with the question. A shepherd who has to bring in his sheep in a snowstorm, and suffers frostbite and loses his life thereby, is the victim of an accident arising out of his employment none the less because a railway guard or a night watchman or a postillion might be equally exposed

to the weather. The comparison of one employment with another is to my mind wholly illegitimate. But when we deal with the effect of natural causes affecting a considerable area, such as severe weather, we are entitled and bound to consider whether the accident arose out of the employment or was merely a consequence of the severity of the weather to which persons in the locality as such and, whether so employed or not, were equally liable. If it is the latter, it does not arise 'out of the employment,' because the man is not specially affected by the severity of the weather by reason of his employment."

Accidents occurring by reason of natural conditions, as rain, cold, heat, lightning, wind, water, fire, etc., are usually those that give the greatest difficulty. But the problem is not solved by referring to the universality of the general natural conditions that bring about the injury, but solely by the consideration whether the particular employment rendered the injury from natural causes greater than if one had not been engaged in such employment.

Thus, the most uncertain active force in nature is probably the lightning. Nobody within the area of the storm is exempt. Yet even in the face of a force so indiscriminate in its action the courts of England have already announced distinctions which they seem to have ignored in the Warner case.

Thus, in Kelly v. Kerry County Council, 42 Ir. L. T. 23, the Irish Court of Appeals held that a man, working on the roads, who was struck by lightning was not injured by reason of an accident arising "out of" his employment. On the other hand, the English Court of Appeals, in Andrew v. Failsworth Industrial Society, 2 K. B. 32 (1904), held that a bricklayer, working on a high scaffold, is subjected to greater danger from lightning, by reason of his position, than one on the road and was, therefore, entitled to compensation for injury resulting from being struck by lightning.

The law in these cases, as all other cases, follows in the wake of science and where science discovers that dangers from the operation of natural forces are increased by certain occupations, or by reason of a person being in certain positions, the law will, and should, give effect to such distinctions. Thus, woodmen, workers on electrical lines, or steeplejacks, may very well be regarded as being exposed to greater dangers from lightning, by reason of their employment, than other persons, even if such increased hazard is impossible to estimate.

If such distinctions can be drawn as to a natural force so indiscriminate in its action as lightning, they are surely warranted in cases where the accident is occasioned by natural forces, whose operation is better understood and danger from which is more easily avoided.

Thus, heat and cold are common and complementary forces of nature, whose laws are well understood. Thus, a man who is compelled by his employment to paint the side of a ship on a hot day in the tropics is not to be denied compenstion simply because other men in other occupations were similarly exposed. It was so held in Morgan v. The "Zenaida," 25 Law T. Rep. 446 (1909). So, also, it would seem to follow if one is compelled by his occupation to work out-of-doors when the weather is severely cold is not to be denied compensation simply because certain others may be exposed to the same hazard.

The sole question in all these cases would seem to be, does the servant's employment expose him to a greater hazard by reason of the operation of natural forces than the community in general? If so, the accident clearly arises "out of" the employment.

NOTES OF IMPORTANT DECISIONS.

RIGHT OF HUSBAND TO ACQUIRE PROPERTY BY ADVERSE POSSESSION AS AGAINST HIS WIFE.—It is difficult to change established rules of law even where the reason for the rule has failed. This is particularly true in respect to the rules of the common law respecting the disabilities of married women. The common law regarded the husband and wife as one person and from this fact of unity logically were derived certain familiar rules which not only deprived the feme covert of her freedom of contract but also restricted the husband in contracting with his wife or acquiring any adverse rights against her or her property.

The fact, however, that the Married Women's Acts in most states have repudiated the common law idea of the unity of the marriage relation and have substituted therefor the civil law idea of the duality of such relation has not been fully appreciated by the courts, who still hesitate to recognize the logic of the situation and frankly declare the wife a *feme sole* for all purposes except in respect of the duties and obligations which she, as well as her husband, have voluntarily assumed by virtue of the marriage relation.

One rule, to which the courts tenaciously cling, is the common law rule which prevented a husband or wife from acquiring property adversely as against the other. In the recent case of Kornegay v. Price, 100 S. E. Rep. 883, this rule is recognized in a case the facts of which raise a very clear issue on which we wish to make a few comments. We do not wish to be understood as criticising the North Carolina Court which rendered this decision, as we have not had the opportunity to make a careful study of the North Carolina Married Women's Act to determine to what extent the disabilities of coverture have been removed in that state.

In the Price case Margaret Price conveyed certain property to her husband, the defendant in this case, by a deed which is admitted to have been void for failing to comply with certain statutory requirements as to securing the approval of a probating officer, etc. After the death of the wife the plaintiff, as the only heir at law of the wife, sued to recover the title and possession of the land. The husband's defense was that his wife's deed, admitting it to be void, was color of title which his adverse possession had ripened into a good title. The trial court sustained the defendant's contention and directed the jury that the plaintiff was not entitled to recover. The Supreme Court, however, disagred with the lower court's view of the law and reversed and remanded the case for a new trial. In reaching this conclusion the Court discusses the case wholly from the viewpoint of the common law and, of course, could find no justification for the trial court's ruling. The Court said, in part:

"It seems to be well settled that, owing to the unity of husband and wife, adverse possession cannot exist between them so long as the coverture continues. But where the marital relations have been terminated by divorce or abandonment, it seems that one may acquire title from the other by adverse possession. I. A. & E. Ency., p. 820, § 11. In First National Bank v. Guerra, 61 Cal. 109, it is held that a wife cannot claim adversely to her husband or those claiming under him so long as he remains the head of the family. It is held further in Hendricks v. Rasson, 53 Mich. 575, 19 N. W. 192, that the husband cannot hold, adversely to his wife, premises belonging to her. Joint possession by husband and wife held under the wife's claim of title inures to her benefit. Templeton v. Twitty, 88 Tenn. 595, 14 S. W. 435. In Vandervoort v. Gould, 36 N. Y. 639, it is held that the possession of premises by husband belonging to his wife can in no sense be deemed adverse. In the note to A. & E. Ency., supra, a large number of cases is cited sustaining the text. See, also, Union Oil Co. v. Stewart, 158 Cal. 149, 110 Pac. 313, Ann. Cas. 1912A, 570 and notes."

There can be no possible criticism of this decision if the common law idea of the unity of the marriage relation has not been changed by the Married Women's Acts. The authorities cited by the Court could be multiplied many times over by authorities from practically every state in the Union adhering to the rule announced by the Court, although most of these cases will be found to have been decided before the Married Women's Acts were passed or without reference to their effect. Where, however, such acts are so far-reaching in their scope as practically to remove all the disabilities of coverture, so that a wife becomes practically a *feme sole* even in respect to her dealings with her husband, there is no possible ground for holding that a husband and wife cannot acquire title from each other by adverse possession. (See Trammell v. Craddock, 93 Ala. 452; Lide v. Park, 135 Ala. 131, 33 So. Rep. 175, 93 Am. St. Rep. 17.) In Warr v. Honeck, 8 Utah 61, 29 Pac. Rep. 1,117, it was held that where a void decree of divorce transferred certain property to the wife, and she lived on it apart from her husband, although still his wife, her possession was adverse to her husband so as to vest title in her.

We do not wish to contend, however, that under certain circumstances, as where the property is held as a common home, the right of the husband or wife to hold such property ad-

versely to the other might not be denied. We wish merely to contend that under the Married Women's Acts some other reason than that of the unity of marital relation must be discovered which prevents acquisition of title by adverse possession under such circumstances. Thus in Berry v. Wiedman, 40 W. Va. 36, 20 S. E. 817, it was held that where land is bought in the husband's name with the wife's money his possession of it as their common home without claim of owenrship expressed to her or to anyone likely to inform her is not adverse to her right to a resulting trust.

The West Virginia case last cited does not arbitrarily adhere to the rule as to the impossibility of husband and wife to hold adversely to the other, but discusses the circumstances under which such holding would not be adverse. It is quite clear that proof of the notoriousness, exclusiveness and hostility of the possession of husband or wife against the other will often be a matter difficult of proof, especially where the property is used as a common home, but this fact does not change the rule that where the disabilities of coverture have been removed and a married woman is regarded as a feme sole it is possible, under proper conditions, for either spouse to acquire property from the other by adverse possession as well as by deed.

RIGHT OF ADMINISTRATOR TO RECOVER INSURANCE FOR DEATH OF DECEDENT WHERE DEATH WAS PROCURED BY ONE WHO IS THE DECEDENT'S SOLE DISTRIBUTEE.—The right of a murderer to sue for any benefits secured to him by the death of the one whose life he has feloniously taken is quite universally denied. Riggs v. Palmer, 115 N. Y. 502, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep 819 (leading case); New York Mutual Life Insurance Co. v. Armstrong, 117 U. S. 591, 6 Sup. Ct. Rep. 877, 29 L. Ed. 997. See, also, 14 R. C. L. 1,228, title Insurance, § 409, and authorities there cited. In the Riggs case a legatee was declared to have forfeited a legacy bequeathed to him by the will of the testator, whom he murdered. The Armstrong case applies the same principle to a suit for the proceeds of insurance by a beneficiary who murdered the insured. This rule is, of course, founded on public policy, which will not permit the felon to reap a legal benefit from his own crime.

In all these cases, however, and many others the courts have merely declared the right of the plaintiff forfeited in favor of other beneficiaries and have permitted suit to be brought in the name of the personal representative of the deceased for the benefit of the latter's estate. For in such cases the defendant who rightfully owes money under a contract with deceased should not be excused from paying it because of the inability of the beneficiary to take. It properly belongs to the estate.

But suppose the murderer is also the sole distributee of the estate. Will the law permit the personal representative to acquire the fund and thus indirectly confer on the murderer that which he could not have acquired directly? This was the interesting question discussed by the Supreme Court of West Virginia in the recent case of Johnston v. Metropolitan Life Ins. Co., 100 S. E. 864. In this case the defendant issued a policy to one Frank Pickens, whose life was subsequently taken by Susie Pickens, his wife, the beneficiary in the policy. The plaintiff, Johnston, however, brought suit on the policy for the benefit of the estate of the insured, but the Court held that he could not recover on the ground that Susie Pickens was under the law the sole distributee of the estate.

It was suggested that a recovery would be allowed in favor of the administrator and Susie Pickens denied the right of inheritance. The reasons why this result was not possible are well stated by the Court:

"Under our law there is no longer corruption of blood or forfeiture of estates upon conviction of crime, and there is no exception in our statutes of descents and distributions precluding one from inheriting in a case like this. The laws governing the devolution of property are an expression of the public policy of the state contained in its Constitution and legislative acts, and the courts are not justified in attaching to these acts exceptions or limitations which have not been placed thereon by the lawmaking bodies. It therefore follows that if the personal representative of the insured in this case is permitted to recover this fund, the beneficiary will accomplish by indirection that which she could not do directly. That the property of one who has been murdered will devolve upon the murderer where such is the course of distribution provided by law seems to be well settled in most of the American states. McAlister v. Fair, 72 Kan. 533, 84 Pac. 112, 3 L. R. A. (N. S.) 726, and note, 115 Am. St. Rep. 233, 7 Ann. Cas. 973; Shellenberger v. Ransom, 41 Neb. 631, 59 N. W. 935, 25 L. R. A. 564, and note; Kuhn v. Kuhn, 125 Iowa 449, 101 N. W. 151; Carpenter's Appeal, 170 Pac. 203, 32 Atl. 637, 29 L. R. A. 145, 50 Am. St. Rep. 765; Owens v. Owens, 100 N. C. 240, 6 S. E. 794; Ellerson v. Westcott, 148 N. Y. 149, 42 N. E. 540; Deem v. Milliken, 6 Ohio C. C. 357, affirmed on appeal 53 Ohio St. 668, 44 N. E. 1,134."

The Court in the principal case was therefore left with no alternative but to deny the administrator of the deceased the right to recover on

the policy in view of the ultimate inheritance of the entire proceeds by the murderess. On this point the Court said:

"Will the courts then allow themselves to be used for the purpose of bringing into existence an estate which will by operation of law devolve on one who because of his conduct is not entitled to it? The administrator has no interest in the subject-matter. It is agreed here that the insured left no debts, and it follows that every dollar of the fund recovered by the administrator in his representative capacity must go to the murderess. The suit is simply in his name for the benefit of the one who feloniously caused the insured's death. The case of McDonald v. Mutual Life Ins. Co., 178 Iowa 863, 160 N. W. 289, is very much like this case in its facts. In that case the administrator of the insured brought the suit to recover on the policy of insurance. It appeared that the sole distributees of the insured's estate were her father and mother, and that they had assisted in a criminal operation which produced her death. The court held that the administrator, if such facts were shown, would not be entitled to recover, for it would be for the benefit of those who are by the public policy of the law denied such right."

It seems to us the decision of the Court is eminently sound if restricted to cases where the murderer is the *sole* distributee. Where, however, other distributees would share the fund, it would hardly be fair to the innocent to deprive them of their rights in order to prevent the guilty party from securing any benefit from his crime.

It is interesting to note that this principle is not confined in its operation to the cases of homicide. It applies to all cases where one seeking a benefit has been guilty of an offense which brings about the condition on which the benefit is conferred. Thus where the basis of the recovery in a damage suit was the wrongful employment of plaintiff's decedents, who were under legal age, the administrator will not be allowed to recover, if the sole distributee is the father who himself sought and procured the employment of his child by the defendant. Dickinson v. Colliery Co., 71 W. Va. 323, 76 S. E. 654, 43 L. R. A. (N. S.) 335; Swope v. Coal Co., 78 W. Va. 517, 89 S. E. 284, L. R. A. 1917A 1,128.

In all these cases the defendant is not excused from his obligation. In fact, the obligation or the liability, as the case might be, is sustained, but the plaintiff prevented from recovering because he himself, or, if the plaintiff is the personal representative of the deceased, the sole distributee of the estate, would receive the benefit of a situation created by his own wrongful act. In all such cases the party who has united with a defendant in the commission of the wrongful act will be prevented from taking advantage of his own wrong.

ODD WILLS AND PECULIAR TESTATORS.

Says Mr. Dooley: "So f'r wan reason or another I've niver made a will, but I'll not deny it must be considhrable spoort f'r thim that has th' manes an' th' imagination to enjye it. To be enjyeable a will must be at wan an' th' same time a practical joke on th' heirs an' an advertisemint iv th' man that made it."[1]

In looking through the books one is forced to admit that this witticism seems to be justified. Of Sir Joseph Jekyll, who by will left his large fortune to pay the national debt, Lord Mansfield said: "Sir Joseph was a good man and a good lawyer, but his bequest was a very foolish one." The heirs contested the will and it was set aside on the ground of imbecility. Sergeant Meynard in the reign of William III purposely worded his will in obscure terms, so there might be litigation to settle intricate law points which had troubled him in his practice at the bar. Curiosity of Law and Lawyers, page 491. It was the will of Lord Chancellor Cowper that his son should never travel, giving as a reason "that there was little to be hoped and much to be feared from traveling." Two centuries later we find a similar request in the will of a Mr. James of San Francisco, who died May 10, 1910. Leaving a large estate to be disposed of under a holographic will, he specially admonished the devisees that there were to be no expensive trips to Europe. His advice was: "Spend your money in this country. Buy or build nice residences and live and enjoy yourselves among people you know." In a codicil he reiterated that there were to be "no trips to Europe."[2]

Thellusen was a shrewd London merchant of Swiss origin, who had accumulated a fortune of $3,000,000 when he died, in 1797. Leaving a widow, three sons and

(1) Dooley on Making a Will and Other Necessary Evils, page 4.

(2) Harris, Ancient, Curious and Famous Wills, 225.

three daughters, he provided that the widow should have $500,000 and that the residue should be invested as "an accumulating fund to be held by trustees during all the lives of the testator's sons and grandsons; and the oldest lineal male descendant" was to have the entire accumulation. The will was contested because of unreasonable restraint of alienation, being for three lives, but was sustained on appeal by the House of Lords in Thellusen v. Woodford, 4 Vesey 227. To place a limitation on property rights the statute 40 Geo. III, chap. 98, was enacted, which limits an accumulation by will or deed to two lives in being and 21 years. Similar statutes to prevent perpetuities are now in force in some States, but not in the State of Washington. That the common law applies seems to have been conceded. In re Galland's Estate, 103 Washington 106. The interminable litigation of the Thellusen case gave Dickens an opportunity to satirize the Court of Chancery under the renowned title of Jarndyce v. Jarndyce in "Bleakhouse," one of his masterpieces. Chancellor Kent, writing about 1830 in his commentaries, refers to Thellusen's will, saying: "If the limitation should extend to upwards of one hundred years, as it may, the property will have amounted to upwards of one hundred million sterling!" 4 Kent's Com. 287. Towards the end of the last century this estate was still in chancery, because of litigation to determine whether "the eldest male descendant or the male descendant of the eldest son should inherit the property." The court decided that the male descendant of the oldest son should have it, following the doctrine of primogeniture. It should be remarked, however, that the expenses of administration, state taxes and costs of litigation were so large that the estate was practically swamped, for there was scarcely more on final distribution than when the testator died; thus Kent's apprehensions of an enormous accumulation were entirely unfounded. No doubt a layman would say "the lawyers made away with this large fortune;" but the testator was to blame for making a foolish will. Thellusen's purpose was to become known as the founder of the largest fortune of his time; it was a species of vanity, for the attainment of which he was willing to deprive his own children of their just inheritance. Nearly all litigation about wills arises because of an attempt on the part of the testator to vent his spleen or malice against some relative or to impose his whim and crochets upon succeeding generations. In a contest the courts and juries are inclined to sympathize with the heirs and find a way to break the will, thereby permitting the estate to be distributed according to law, despite Judge Lamm's epigram: "Where there is a will there is not always a way—to break it."[3]

To provide evidence to sustain the will some testators have experts to certify to their competency and mental soundness by attaching such certificate. As a precaution to prove that a testator is of sound and disposing mind and free from delusions, this proceeding is not only of doubtful value but risky, as was said in Greenwood v. Cline, 7 Ore. 29, thus: "Procuring certificates of two physicians attached to the will that they have examined testatrix and find her of sound mind and perfectly competent to make her will, is an unusual circumstance, which leads to a suspicion against the integrity of the instrument."

Jeremy Bentham was a great law reformer and philosopher. One would not suspect any foibles in his will. Yet the fact is that he bequeathed his body to Dr. Southworth Smith, "that his preserved figure might be placed in a chair at the banquet table of his friends and disciples when they met on any great occasions of philosophy and philanthropy." This curious request was actually carried out, the body having been provided with a wax mask to resemble him in life and placed in a mahogany glass case. It is now at University College, Oxford.[4]

The acquisition of phenomenal fortunes on the Pacific Coast, resulting in extrava-

(3) Wit, Wisdom and Philosophy, 17.
(4) White's Legal Antiquities, 324.

gant living and views, produced some peculiar wills. Perhaps the most noted was the will of James G. Fair, at one time Senator from Nevada, which involved an estate of more than $15,000,000. He died in San Francisco December 28, 1894; the next day a will was filed leaving his estate in trust for his three children, giving them the income for life, and upon their decease to be disposed of in various ways. On March 18, 1895, a pencil will was filed by Nettie R. Craven, then a principal in a public school. This second will devised the estate to the three Fair children direct, and was supported by them as the will of their father. After lengthy litigation it was determined that the Craven will was a forgery, together with deeds from Fair to her of valuable San Francisco property. The courts sustained the trust feature of the first will by a four to three vote.[5]

Senator Broderick, who was killed by Judge David S. Terry in a duel September 16, 1859, left property of more than $250,000. An alleged will was admitted to probate in San Francisco October 20, 1860, whereby Broderick devised his whole estate to John A. McGlynn and George Wilkes. On November 29, 1861—more than one year after the entry of the judgment admitting the will to probate—the State of California filed a petition to escheat the estate because the deceased left no known heirs and that the will probated was not executed by Broderick. The lower court set aside the judgment declaring the will to be a forgery. This decision was reversed on appeal in California v. McGlynn, 20 Cal. 231. The court remarked: "If it shall be found that the decree of the probate court, not reversed by the appellate court, is final and conclusive, and that so long as the probate stands the will must be recognized and admitted in all courts to be valid, then it will be immaterial and useless to inquire whether the will in question was in fact genuine or forged." This was based upon a statute which provided, "if no person shall within one year after the probate contest the same, or the validity of the will, the probate of the will shall be conclusive;" therefore, the Supreme Court held the judgment final and conclusive after one year, and not subject to attack directly or collaterally. In 1869 relatives of Broderick brought suit in the U. S. Circuit Court to vacate the decree, upon the ground that the will was a fraud; but without success. This ruling was affirmed in the U. S. Supreme Court by a divided opinion.[6] The decision of the California court holding that a court of equity could not grant relief from a forged will, unless a contest was commenced for that purpose within one year after the entry of an *ex parte* judgment admitting such will to probate, has been much criticised and severely condemned. One writer said: "In the history of enlightened jurisprudence, this is a solitary instance where a forged will has been upheld because courts exercising equity jurisdiction were unable to give relief." Schenk's Bench and Bar of California 212. The Broderick case was decided correctly if judgments are to have any permanency and conclusive effect. Whether the will was forged could have been determined in the probate proceedings, within one year after admission to probate as provided by statute; therefore, after one year the time for contest was barred. This case was cited in Hoscheid's Estate, 78 Wash. 309, upon the theory that the statute is one of limitation; otherwise, there would be no certainty to titles acquired through wills and probate proceedings.

For many years an eccentric character lived in Seattle, who called himself Melody Choir, his real name being Joseph H. Melchoir. Like many people, not insane, however, he tried to get something for nothing, which he sought to accomplish by acquiring tax titles to Seattle property. Some of the lots he purchased for less than $5 each, through the rapid growth of the city, in the course of thirty years, had in-

(5) In re Fair's Estate, 60 Pac. 442.

(6) Broderick's Will, 21 Wall. 503.

creased to $5,000. At the time of his death, than $120,000. The writer appeared as in 1907, his estate was appraised at more counsel for him in Baer v. Choir, 7 Wash. 631, which involved a tax deed. The lower court upheld his title, but the Supreme Court directed a reversal, declaring the deed void, which Choir, through his delusions, attributed to a conspiracy against him. For years he lived in a dug-out, his only friend being a dog, as queer as his master. Of course, he left a will. "For the benefit of posterity" he listed mankind according to a scale of merits; some were designated as trustworthy, others as suspicious, and the remainder as "unhung scoundrels;" his counsel and the appellate court attained to the "bad eminence" of the last class.

Choir's will is closely written in a bound book of 148 pages, ten inches by eighteen inches. At the top and bottom of each page he wrote in red ink, "Witness my hand and seal—Melody Choir," followed by an elaborate seal, and dated October 20, 1900. The will was admitted to probate March 1, 1907. He writes of himself thus: "The incontrovertible facts in my case are these—there never was a better, all round individual ever set foot upon the regions of this broad State, than myself!" He declares that in 1875 he read Blackstone, but detested attorneys, for he says: "I never liked lawyers as a class, and to keep away from them and steer clear of their inveigling schemes and grasping machinations—ever an active ingredient in their diabolical profession—has been my constant, lifelong effort."

His egotism stood out *ad nauseam;* his egregious vanity caused him to provide that all his property should be spent for a mausoleum for himself and dog "Hoboe," plans and specifications for which are completely shown in the will—it even shows a diagram of his teeth; his great virtues were to be engraven on the monument in ten languages. That no one might contest because of any marital relations, he declares: "I never was married or even engaged to be married. Nor ever gave to any female, old or young, married or single, maid or widow, white or any color, directly or indirectly, verbal or written, open or implied, any pledge, vow or promise of marriage whatsoever."

His will was contested by his brothers and declared void because of insane delusions.

Alfred Nobel, a Swedish inventor, died in Stockholm in 1896, leaving an estate of $9,000,000, the income of which, according to his will, is to be divided annually among five persons most distinguished and deserving in physics, chemistry, medicine, literature, and in the cause of universal peace. Each prize is about $38,000. The first was given to Roentgen in 1901 for the X-ray. Mme. Curie obtained a joint prize with Bequerel in physics in 1903; she was favored with a full prize for chemistry in 1911, in relation to radium. In 1906 a peace prize was awarded to President Roosevelt. It is rather paradoxical that a promoter of world peace should be recognized, for Nobel made his fortune out of explosives.

The bequests of Cecil Rhodes are likely to have a more momentous effect upon nations than any other will. When a young man he went to South Africa. Through great industry and keen perception of golden opportunities, he amassed a fortune of many millions out of the Kimberley mines. As with Warren Hastings and Lord Clive, the extension and grandeur of the British Empire became an obsession with him. He was the greatest of all imperialists. He, therefore, determined to devote his vast fortune to continue his imperialistic influence to remote generations. Few men by their energy and intelligence have succeeded in writing their names across a great continent as Rhodes did in Rhodesia. On September 19, 1877, at the age of 22 years, he wrote his first will which evidences his world-dominating ambition for his native

land. The part applicable directs that his estate be used "to and for the establishment, promotion and development of a secret society, the true aim and object whereof shall be the extension of British rule throughout the world, the perfecting of a system of emigration from the United Kingdom and of colonization by British subjects of all lands where the means of livelihood are attainable by energy, labor and enterprise, and especially the occupation by British settlers of the entire continent of Africa, the Holy Land, the Valley of the Euphrates, the Islands of Cyprus and Candia, the whole of South America, the islands of the Pacific and heretofore possessed by Great Britain, the whole of the Malay Archipelago, the seaboard of China and Japan, and the ultimate recovery of the United States of America, as an integral part of the British Empire.[7] Later he revised this will, but the underlying principle is world power and dominion. On July 1, 1899, he executed the will admitted to probate, by which his fortune was devised in trust to Earl Roseberry, Earl Grey, Viscount Milner, Alfred Beit, Dr. Jameson and Sir Lewis Mitchell, to be used for the establishment of scholarships at Oxford University, of which one hundred were allotted to the United States upon the same conditions as those awarded to the colonies. Rhodes declared that "it was foolish to leave large fortunes to relatives; it was so much wasted money."[8]

The books are full of strange will cases and unusual circumstances under which wills were missing, and of the neglect of testators to follow some local requirement of statute law, through which great estates became the properties of persons never favored by the possessors. Novelists have taken advantage of these instances and written many a tale of absorbing interest based on lost, destroyed or defective wills. As an illustration: in Pennsylvania a husband and wife proposed to will their property to each other. Through inadvertence each signed the other's will, which, of course, was void. The Legislature passed an act to validate these wills, which the court declared illegal, as title had vested in the heirs and they could not be deprived of it by statute.[9]

A most interesting case of mystery is the lost will of Lord St. Leonards. As Edward Sugden he attained a reputation as a great lawyer. When 22 years old he had written a treatise on Vendors and Purchasers, for which he was paid $20,000. His father was a barber, so it cannot be said that he was boosted into high office through family influence. As Lord Chancellor he had occasion to declare the law of wills and often advised that "to put off making your will until the hand of death is upon you evinces either cowardice or shameful neglect of your temporal affairs. It is sinning in your grave." Note the irony of fate that his own will was missing, but six codicils were there. It was shown in explanation that there was a duplicate key to the will box, but there were four keys that allowed access to the duplicate, which reminds one of "Seven Keys to Baldpate." Oral testimony was offered to prove the contents of the lost will and admitted, which was sustained on appeal.[10]

The conclusion one may draw from the books is that testators should be satisfied with a simple, business-like will, which should be clear and specific, and should avoid numerous details, and above all that its provisions should be reasonable and just to anyone who has a legal right to be considered a beneficiary.

Edward H. Harriman was a business man of rare sagacity. His will is a model of brevity and good sense. He disposed of a colossal fortune of more than sixty mil-

(7) Life of Cecil Rhodes, by Sir Lewis Mitchell, pp. 72-3.

(8) Life of Cecil Rhodes, by Philip Jourdan, 75.

(9) Alter's Appeal, 67 Pa. St. 341.

(10) Sugden v. Lord St. Leonards, 34 L. T. Rep. 372.

lions in these few words: "I give, devise and bequeath all my property, real and personal, of every kind and nature, to my wife, Mary W. Harriman, to be hers absolutely and forever, and I do hereby nominate and appoint the said Mary W. Harriman as executrix in this will." Signed by himself and two witnesses. This will would no doubt be valid anywhere, except for some local statutory requirements. In the State of Washington children should be provided for—that is, named in the will—otherwise there would be intestacy as to them; it would also have been advisable to provide that the executrix should not be required to give a bond.

This subject is as interesting and romantic as a tale from the Arabian Nights. There is the Gerard will case, argued by Daniel Webster before the United States Supreme Court; the Tilden trust, held void by a divided court; George Peabody's great benefactions stand out as remarkable achievements of one who began as a poor boy and who served in the War of 1812 as a private; and James Smithson, who endowed this nation with the Smithsonian Institute.

Why wills often pass human understanding was the speculation of Commodore Vanderbilt when he commented on the will of A. T. Stewart, saying: "I can't understand how the greatest merchant in this country, who began with nothing and made a fortune of millions, who was always clear-headed in business matters—how was it possible for a man of that kind to make such an utter damn fool of himself when he came to write his will." It should be added that the same question was probably asked by the heirs of the Commodore when they contested his will. Perhaps counsel in that case would not have conceded that Vanderbilt was any kind of a fool, for one of them, Henry L. Clinton, drew down a fee of $600,000.

FRED H. PETERSEN.

Seattle, Wash.

BILLS AND NOTES—TRANSFER AFTER MATURITY.

ETHERIDGE et al. v. CAMPBELL.

Commission of Appeals of Texas, Section A. Nov. 5, 1919.

215 S. W. 441.

The purchaser of a past-due note is charged with notice of any defense which the maker has, but is not charged with notice of the secret equities of third persons.

STRONG, J. Defendant in error brought this suit against plaintiffs in error in the ordinary form of trespass to try title to two lots in the city of Dallas. The trial in the lower court was without the intervention of a jury, and resulted in a judgment in favor of defendant in error, which was affirmed by the Court of Civil Appeals. 179 S. W. 1,144.

Both parties claim under the Dallas Land & Loan Company as a common source. The lots in controversy were on September 22, 1890, conveyed to Hollingsworth Bros. by said company, the consideration being $150 in cash and four notes executed by the grantees, one for the sum of $100, due in six months, and three for the sum of $250 each, due respectively September 22, 1892, September 22, 1893, and September 22, 1894. The deed contained an express reservation of the vendor's lien, and was duly recorded in 1890. The grantees, as additional security, also executed a deed of trust on the property, which was filed for record on September 23, 1890. Hollingsworth Bros. failed to pay the notes, abandoned their contract, and left the state. The Dallas Land & Loan Company on June 9, 1891, made to C. E. Bird, as assignee, a general assignment for the benefit of creditors. Bird, as assignee, on July 21, 1892, deeded to T. L. Marsalis all the property then held by him under said assignment, except certain lots described in the deed, the exception not including the lots in controversy. Marsalis on July 21, 1910, deeded to David Scott the two lots in controversy, which on August 23, 1910, were conveyed by Scott to plaintiff in error, I. G. Etheridge. On June 2, 1913, Marsalis and Scott, by written transfer, conveyed the notes and lien above described to Etheridge. Snodgrass, the trustee in the deed of trust, resigned; and under the authority conferred therein, Etheridge appointed J. L. Addison as substitute trustee. Addison, under the authority conferred in the deed of trust, sold the lots at public sale on July

1, 1913, and Etheridge became the purchaser at the sale.

The defendant in error holds under J. R. Campbell, who purchased the title of Hollingsworth Bros. on May 2, 1912. He also introduced in evidence a release from George J. Bryan, to whom it was claimed the Hollingsworth notes were transferred by the Dallas Land & Loan Company before it made the general assignment for the benefit of creditors, and offered testimony which the Court of Civil Appeals held sufficient to show such transfer. The transfer, however, was not filed for record, and Etheridge had no notice thereof at the time he purchased the notes and lien.

We are of opinion, under the facts stated, that Etheridge was an innocent purchaser of the Hollingsworth notes and lien, and as such entitled to protection. In so far as the record disclosed, the loan company was the owner of the notes, and as such held the superior title to the lots, at the time it made the general assignment for the benefit of creditors. The record title to the notes and lien passed by the assignment to the assignee. It is true the title which the assignee takes under a general assignment is no better than that which the assignor has, and as a general rule only such title will pass to a purchaser under the assignee, whether immediate or remote. But where a purchaser upon the faith of the record pays value, without notice of a secret equity with which the property was affected at the time of the assignment, he acquires such title as the records disclose the assignor owned. Cantrell v. Dyer, 6 Tex. Civ. App. 551, 25 S. W. 1,098.

It is immaterial that the notes were not listed in the inventory. Under a general assignment for the benefit of creditors, all the property of the debtor, except that exempt from forced sale, passes to the assignee, whether included in the inventory or not; and parties dealing with the property, who are not in possession of facts sufficient to put them upon inquiry, have a right to rely upon the record as to its true ownership. The transfer of vendor's lien notes is within our registration statutes. It was within the power of Bryan to have taken a written assignment of the notes and to have placed same of record, thus apprising subsequent purchasers of his rights. Having failed to do this, and Etheridge having acquired the notes through the record owner thereof, without notice of Bryan's claim, he is entitled to protection as an innocent purchaser.

The fact that the notes were past due is immaterial. The purchaser of a past-due note is charged with notice of any defense which the maker has, but is not charged with notice of the secret equities of third persons. Gee v. Parks, 193 S. W. 767. It follows, therefore, that the title acquired by Etheridge to the lots under the sale foreclosing the lien is superior to that claimed by the defendant in error. Morgan v. Wheeler, 87 Tex. 179, 27 S. W. 54; Patty v. Middleton, 82 Tex. 586, 17 S. W. 909; Cantrell v. Dyer, supra; Loan Association v. Brackett, 91 Tex. 44, 40 S. W. 719.

We are of the opinion that the judgment of the Court of Civil Appeals and that of the trial court should be reversed, and judgment here rendered for plaintiffs in error.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted, and will be entered as the judgment of the Supreme Court.

NOTE.—*Transfer of Overdue Paper Cutting Off Secret Equities.*—In Gymnasium Co. v. Rockford Nat. Bank, 179 Ill. 599, 54 N. E. 297, 46 L. R. A. 753, 70 Am. St. R. 135, it was said: "The inquiry then must be: Is the fact that the paper is past due when transferred sufficient, of itself, to charge the taker with notice of the latent equities of third parties? Our statute fixes the rights of the maker in such cases upon clear principles of justice, without materially affecting the negotiability of commercial instruments; but to extend the same protection to whoever may have acquired some collateral interest in the paper would be to charge him with knowledge of a fact not within his power of ascertainment and practically destroy the negotiability of overdue instruments." Thus reasoning, it was held in that case that the pledgee of overdue negotiable paper found in the hands of assignee thereof, as received from assignor, was not protected.

In Kelly v. Staed, 136 Mo. 430, 37 S. W. 1,100, 58 Am. St. Rep. 648, that such paper "is only subject in the hands of the indorsee to such equities and defenses as are connected with the note itself, and not such as grow out of transactions disconnected with the note." There is quite an elaborate discussion of Missouri authorities in this case. And in Loewen v. Forsee, 137 Mo. 29, 38 S. W. 712, 59 Am. St. Rep. 489, it was observed, relative to the facts there appearing, that: "Had the note taken by Mrs. Forsee in satisfaction of the indebtedness of her husband to her, and without notice of the existence of the agreement between her husband and Hicks by which the latter's deed of trust was to have preference over that of her husband, the note would not be subject in her hands to any equitable defenses existing between the original parties thereto." In Moffett v. Parker, 71 Minn. 139, 73 N. W. 851, 70 Am. St. Rep. 319, it is said: "It is the settled law of this state that a mortgage has none of the privileges of negotiable paper, but is a mere chose in action; hence an assignee thereof takes it subject to any defense that exists between the original parties, unless they are equitably by their acts, or otherwise, debarred from asserting it as against the assignee. But it does not follow from this proposition that the plaintiffs have any equity superior to the bank to have the mortgage canceled, for it is equally well settled,

at least in this state, that the assignee of a mere chose in action or of past-due negotiable paper takes it subject to the equities of the original parties thereto, *but not as to any equities of third parties of which he has no notice.*" Italics are those of the author of this note.

It would seem that there is an exception to this doctrine found in an Indiana decision by its Appellate Court, wherein it is said that: "It is a most salutory rule, and one which the courts should strictly enforce, that anyone who purchases a note not governed by the law merchant should at once notify the maker of the change of ownership, if he desires to be protected against defenses afterwards acquired by the maker; and the maker of the note is thus placed upon his guard and warned not to extend credit to the payee, upon the supposition that the same will be a credit upon his contract when the time for settlement arrives." Cox, Receiver, v. Bank of Westfield, 18 Ind. App. 248, 47 N. E. 841. But would not this necessarily be an equity not arising out of the transaction between original parties, whether the note were acquired before due or after due?

It seems to me that the rule supported by the instant case is the just one and one to which the taker of a past-due obligation trusts to transferrer to reveal the then condition of things by the giving of such information as may be verified by such taker. In other words, the purchaser does not buy something that may have little or no value whatever, because of some equity accruing to one not directly therefrom arising. C.

ITEMS OF PROFESSIONAL INTEREST.

THE END OF THE STORM

Lawyers are always appreciative of effective figures of speech. One which struck us as being very effective, and in which the analogies are as logical as they are encouraging, appeared in a recent editorial in the St. Louis Globe-Democrat. We quote:

"A great storm does not come to an end instantly. After the thunders cease, and even after the winds are stilled, the waves continue to beat the shores furiously. It is so with the great conflicts among men. The thunders of colossal war stopped on November 11, 1918, but the surge of the forces it had created could not be checked by an armistice. The year just closed has been a trying one for mankind. The normal processes of civilization had been violently disturbed. New currents had set in, creating dangerous whirlpools. The blackness of night had lifted, but heavy clouds remained. The winds still blew in uncertain and conflicting directions. Equilibrium was lost and action and reaction battled for its restoration. But every storm must have its end; every tempest must subside. Equilibrium is the normal state of nature, and whenever and however it is disturbed, the balancing forces surely rally for its re-establishment and inevitably the calm succeeds.

"Slowly, gradually, but with absolute certainty, the equilibrium of mankind is being restored. It is not easy to realize this when we look abroad upon the world today, for unrest is still manifest, and we are yet bewildered by the conditions and the problems that we face. But if we look back a year we can see that progress has been made toward subsidence of the waves. Conditions are still confused and complicated, but chaos no longer reigns. The elements and the powers of order are becoming again dominant. Definite form is beginning to emerge. Great problems are approaching solution. Anarchy is consuming itself. Physical necessities are compelling the return of stability, the increase of labor, and the dissipation of hallucinations. Work, the panacea of all ills, is applying its balm to the wounds of war. The griefs and hates are being softened by the soothing hands of time. Slowly, haltingly, with difficulty but surely, humanity is finding the solid ground of Ararat."

BOOK REVIEW.

HUEBNER'S HISTORY OF PRIVATE GERMAN LAW.

The close of the titanic struggle with German militarism will no doubt revive interest in the studies of continental jurisprudence. With the ratification of the Peace Treaty, including some form of international control of world affairs, England and America will become more and more vitally interested in the principles of jurisprudence recognized on the Continent, and a comparative study of the laws of those countries of Europe whose jurisprudence is based on the Civil Law cannot fail to give the common law student a wider conception of the universality of legal concepts and free him from the narrow confines and provincial horizon which has hitherto hedged him about.

Wonderful as has been the growth of the common law, it is a mistake to assume that it is exclusively Anglo-Saxon. The common law owes much to contributions received from Danes and Normans, who introduced the pure Germanic and Gothic Roman conceptions of legal principles. A study of legal concepts from the historical point of view, therefore, as well as of their development in communities whose manner of life and whose social and business ideals have much in common with our own, cannot help but prove profitable and interesting.

For these reasons and others that will occur to the student of comparative jurisprudence, the lawyers of the country, we are sure, are quite ready to express their sense of obligation to the Committee of the Association of Ameri-

can Law Schools, who have at considerable expense and labor translated and published the various treatises in the series known as the Continental Legal History Series, of which the volume now under review is a recent addition.

The present work—"The History of Germanic Private Law"—is by Professor Rudolf Heubner, of the University of Gissen. It is a history of the private law of Germanic countries and principalities, whose principles of law are traced back to their sources in the anarchic individualism of the Germanic tribes of the medieval period. Local liberty was, and is today, except as modified by a strong nationalism, the strongest feature of Teutonic life.

The author traces the struggle, more fierce in Germany than elsewhere, from individualism to particularism and then to nationalism, due to social changes. He also shows how the Roman law was *received* into Germany and how it conquered because of the extreme individualism of Germanic customs which had no *curia regis* as in England to mold it into shape, correct its defects, and apply it to changed conditions of society. The so-called Reception of Roman Law into Germany was rather an unconscious absorption of its principles by the less civilized tribes of the Teutonic invaders, although not without much opposition. The German law is therefore not Teutonic, nor Roman, but the product of a reconstruction of the tribal customs in recognition of, as well as in opposition to, the principles of Roman law. The Germanic law has reaped the benefit of the strength and popularity of the old tribal common law and customs corrected and improved by contact with the more enlightened concepts of Roman law.

The author's treatment of the idea of seizin in Germanic Law is interesting. It did not, in view of the Roman influence, develop into a mere possessory right with a system of "possessory actions" as in England, but into a system of ownership in which the abstract right of possession was not regarded as pre-eminent. There was no development of possessory remedies, but the purpose of the law in practical usage was to determine the title very similar to the suit to quiet title which the English law had to borrow from the Roman through the chancellor. The peculiar features of an action in ejectment had no counterpart in Germanic law.

It is, of course, impossible to give any complete idea of the results of researches such as Huebner's in the present treatise, but enough has been said, we believe, to show that there are many interesting analogies in the development of German law, brought out and made clear by Huebner's thorough investigation, which cannot but be of great value to students of the common law.

The work is translated by Prof. Francis L. Philbrock of the University of California and a very valuable introduction is contributed by Paul Vinogradoff, Corpus Professor of Jurisprudence in Oxford University.

Printed in one volume of 785 pages, bound in cloth and published by Little, Brown & Co., Boston.

CORRESPONDENCE.

RIGHTS OF THE PEOPLE IN INDUSTRY.

Editor Central Law Jaurnal:

I write to commend your editorials on the correlative rights of employers, workers and the people in industry.

It is highly appropriate that the *Central Law Journal*, that power for law and order, sane and right thinking, which reaches the largest clientele of bright minds and progressive intellects, should undertake a sane and seasonable discussion of the evils of the present hour, their cause or origin and their remedy; appropriate, because one of the roots of these evils is sunken deeply into the soil of the legal fraternity. Lawyers, as a class, are learned, patriotic and upright—the leaders of thought and progress for the amelioration of the conditions which oppress a struggling humanity; but there are, unfortunately, men who will prostitute their ability and their learning and a noble profession to serve any cause, however vicious—anarchy and arson, Bolshevism and breweries, and other like evils and heinous offenses against humanity and the laws of the land—provided only it "has the price."

It is greatly to be hoped that the effect of the efforts of the *Central Law Journal* will be to raise the standard of "outlook" of all members of the profession touching these matters, and enforce a realization of the fact that there are some things an attorney cannot afford to do, some cases which an attorney cannot afford to take, even for a "fat fee."

An Emma Goldman and others of her ilk are deliberate law-breakers, who live and labor in our too hospitable midst for but one purpose, and that is to tear down and destroy our insti-

tutions and bring on anarchy and ruin. The Fosters and Lewises, who wantonly and without just cause call strikes of the laborers in labor unions for the purpose of forcing up wages and the shortening of the hours of labor, are common enemies, alike, of *honest* labor and of humanity—declare war on the government and the public at large. An adequate punish-

An adequate punishment must be provided for this kind of warfare, the same as for warfare with firearms, and it is up to the legal profession to devise it. The less than 3 per cent of the population, led by non-laboring fire-eaters, must not be permitted to enthrall and oppress the remaining 97 per cent of the people, in defiance of law and order—if our institutions are to survive. It is claimed on the part of these marplots that there is a constitutional right to strike. This is a mere figment of the imagination; "chimney-corner law" made current by ignorance. There is no such right, and, if our institutions are to survive and the liberty of the people be preserved, there never can be. A strike is fundamentally wrong. It is in truth nothing but a conspiracy to injure the employer and his business and, more particularly, the public at large. Is there any reason in the nature of things that such an injurious "right" should be secured to less than 3 per cent of the people, when it is denied to the other 97 per cent? At common law, and formerly in every state in the Union, such a conspiracy was a felony and punishable as such. It is still a felony in all its essential elements, and the protecting aegis thrown around such criminal acts by misguided legislators should be speedily removed and the former wholesome provisions restored.

Whatever real grievances laboring men may have can and should be remedied in a peaceful and legal manner, and not by declaring war upon, and inflicting hardship and loss upon, innocent persons in no way involved in or responsible for, or able to correct, the supposed grievance—the general public.

HARRY M. HANSON.

Pasadena, Cal.

BOOKS RECEIVED

"Cases on the Law of Evidence. Selected From Decisions of English and American Courts." By Edward W. Hinton, Professor of Law in the University of Chicago. American Casebook Series. William R. Vance, general editor. St. Paul. West Publishing Co., 1919. Review will follow.

HUMOR OF THE LAW.

Lawyer—And now that I have saved you from that bootlegging charge, what do you consider my services worth?

Negro Client—I ain't got no money, boss, but I'll give you two gallons of whisky.—Stanford Chaparral.

"Watched a lady lawyer in court the other day." "Did she know any law?" "I dunno. But every motion she made was graceful."—Louisville Courier-Journal.

"She seems to be always sifting evidence."

"That's because she's straining to find grounds for a divorce."—Buffalo News.

The detective sat in a corner of the station house exclaiming, "He's a thief, a scoundrel, a blackleg"——

"Less noise there," said the sergeant. "What are you doing?"

"Why, I'm running down a criminal."—Boston Transcript.

There rushed into the police station a youngster very much out of breath, who gasped out to Chief Holmes:

"You're—wanted—down—town—in our street—an'—bring an' ambulance!"

"What's the trouble?" demanded the chief. "And why bring an ambulance?"

"Because," the kiddie explained, when he had recovered his breath, "mother's found the lady that pinched the doormat."

"You shouldn't say this young couple 'committed' matrimony."

"Why not?"

"It isn't good taste. You talk as if they had done something wrong."

"They have. When a young man who isn't earning over $25 a week marries a girl who can't boil water and thinks that when she charges a hat to father it never has to be paid for, in my opinion they have committed matrimony."—Birmingham Age-Herald.

In a certain St. Louis office argument about the Peace Treaty and the League of Nations has been long and lively, and sometimes the stenographers find it difficult to keep their minds on their work. One day an eastern firm was surprised to receive a letter saying:

"Gentlemen: We regret that you have not sent us promptly our League of Nations. Unless you can make shipment by the tenth you may cancel our order."

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Adverse Possession** — Encroachment. — Long-continued encroachment of abutting owner on highway, such as the maintenance of fences for 20 years, will not prevent removal of such fences by the proper authorities on theory of acquiscence.—Webster County v. Wasem Plaster Co., Ia., 174 N. W. 583.

2. **Assignments**—Notice by Mail.—Notice of an assignment deposited in the mail by an assignee does not become effective as against the holder of the fund assigned or the debtor until it is actually communicated to him.—In re Leterman, Becher & Co., U. S. C. C. A., 260 Fed. 543.

3. **Attachments**—Consolidation of Actions.—It is no defense to an action on an attachment bond that the original action in which the bond was given was consolidated and tried with other actions.—Gregory v. U. S. Fidelity & Guaranty Co., Kan., 185 Pac. 35.

4. **Bills and Notes**—Holder in Due Course.—Where maker and payee of note at the time it was signed also signed an agreement that no payment should be made on the note unless the payee first performed certain things, the maker of the note, in an action by one to whom the payee had transferred it, could set up as a defense the fact that the payee had not performed the things he agreed to at the time the note was executed, where the transferee was not a holder in due course.—Lutton v. Baker, Ia., 174 N. W. 599.

5. **Carriers of Goods**—Draft on Consignee.—Bank which purchases bill of lading and makes draft on consignee is not liable on any implied warranty of goods nor subject to attachment of proceeds of draft where consignor is insolvent.—Terre Haute Nat. Bank v. Horne-Andrews Commission Co., Ga., 101 S. E. 6.

6. **Carriers of Passengers**—Relation of Passenger.—It is not necessary that the fare be paid to establish the relation of carrier and passenger, and where one boards a train with the implied invitation or consent of the company's agent or conductor to take passage and with the intention of paying, the relationship is established.—Louisville & N. R. Co. v. Harper, Ala., 83 So. 142.

7.——Safety Devices.—Carriers, being under the highest duty to provide and maintain suitable and safe equipments and appliances, must keep pace with the science and art of their business; and, while not bound to adopt every new device unless it contributes to safety, they must adopt those improved modes known to conduce to safety, and cannot escape liability for injuries to a passenger where they have not adopted safety devices generally in use by other carriers.—Central of Georgia R. Co. v. Robertson, Ala., 83 So. 102.

8. **Charities**—Poor Relations. — At common law, dispositions in favor of poor relations are to be ranked among charitable uses, whenever they seem to have been treated as such by the testator.—In re Moller's Estate, N. Y., 178 N. Y. S. 682.

9. **Conspiracy**—Co-Conspirator. — One who connects himself with an existing conspiracy and joins in carrying out the common purpose and design will be deemed a party to every act which had before been done by the others, and a party to every act which may afterwards be done by any of the others in furtherance of such design.—Roberts v. State, Ind., 124 N. E. 750.

10. **Contracts**—Waiver.—Contracts, the execution of which are induced by fraudulent acts or omissions to the injury of the party defrauded, are voidable, not absolutely void, and an infirmity so intervening may be waived or surrendered by the party defrauded.—Barbour v. Poncelor, Ala., 83 So. 130.

11. **Corporations**—Collateral Attack. — The extent of franchise rights of corporations to acquire, hold, or dispose of property cannot be collaterally inquired into in a suit in ejectment between third parties.—Daniel v. Wade, Ala., 83 So. 99.

12.——Diversion of Assets.—A stockholder may maintain suit for wrongful diversion of assets of corporation, where he alleges and proves that a request or demand has been made upon the board of directors or other body managing the corporation to institute proceedings and they have refused, or upon allegation and proof that it is reasonably certain a demand for corporate action would have been useless.—Liggett v. Roanoke Water Co., Va., 101 S. E. 55.

13.——Officers and Directors.—The relations of officers and directors of a corporation in respect to private business transactions with the corporation are more closely scrutinized than those of mere stockholders, and directors are bound to

exercise nothing short of the uberrima fides of the civil law, and they must not in any degree allow their official conduct to be swayed by their private interests or welfare, unless that interest be one they have in the good of the company in common with all of the stockholders.—Reinhardt v. Owensboro Planing Mill Co., Ky., 215 S. W. 523.

14.——Promoter.—Whenever in the organization of a corporation a quasi trust relation arises between the promoter and the inchoate corporation, and there is a breach of fiduciary duty growing out of such relation, the corporation may maintain an action in equity for discovery and accounting, to rescind or set aside the agreement or transfer, to establish the trust and recover secret profits.—McNabb v. Tampa & St. Petersburg Land Co., Fla., 83, So. 90.

15. **Criminal Law**—Corpus Delicti.—The corpus delicti cannot be established alone by the uncorroborated extrajudicial confession of the accused.—Francis v. State, Okla., 185 Pac. 126.

16. **Damages**—Mitigating.—The rule that an injured party should do what reasonable care and business prudence requires to reduce loss has no application where the wrongdoer has the opportunity to remedy the wrong and avoid damage, and when it would require the expenditure of money by the injured party.—Shaw v. City of Greensboro, N. C., 101 S. E. 27.

17. **Deeds**—Undue Influence.—In executor's suit to set aside, for undue influence, deed of his 93-year-old testatrix to one who was her housekeeper and nurse, the burden was on defendant grantee, because of the confidential relationship, to establish the clearest proof that the transaction was fair and free from fraud or undue influence.—Jacobs' Ex'r v. Meyers, Ky., 215 S. W. 532.

18. **Equity**—Technicality.—Equity will disregard mere forms, and will not permit a substantial right to be defeated by the interposition of merely nominal or technical distinctions.—Leeka v. Muncie Savings & Loan Co., Ind., 124 N. E. 762.

19. **Execution** — Estoppel. — Where plaintiff, with knowledge of the invalidity of a judgment against him, acquiesced in the sale of his property to satisfy an execution issued on the judgment, he is estopped from thereafter maintaining an action of conversion against the sheriff, etc., who conducted the sale.—Sproul v. Monteith, Colo., 185 Pac. 270.

20. **Executors and Administrators**—Equality in Distribution.—Since it is illegal for an administrator to prefer part of the creditors, creditors cannot secure a preference by reducing their claims to judgments and levying on the goods in the hands of the administrator.—Blaisdell v. Peavey, N. H., 108 Atl. 134.

21.——Secured Debt.—The holder of a secured debt need not exhibit it as a demand against the estate of his debtor, if he is content to look only to his security for payment.—Linn County Bank v. Grisham, Kan., 185 Pac. 54.

22. **Exemptions** — Waiver. — Incumbrance of property exempt to head of family being, under Code 1897, § 2906, void, where his wife does not join therein, he does not waive his exemption by alone giving a mortgage thereon, and cannot waive it thereafter.—Augustine v. Gold, Iowa, 174 N. W. 581.

23. **Frauds, Statute Of**—Debt, Default or Miscarriage.—An agreement by defendant that if plaintiff who had charged his son with seduction would marry the son and stop civil and criminal proceedings against the son defendant would convey to her a parcel of land is not within the statute of frauds as an agreement to answer for the debt, default or miscarriage of another.—Bader v. Hiscox, Iowa, 174 N. W. 565.

24.——Deceit Action For.—To sustain action for deceit, the representation must be shown to have been not only false in fact, but known to be false and made with fraudulent intent.—Sarson v. Maccia, N. J., 108 Atl. 109.

25.——Performance Within One Year.—In view of the rule that the construction of a contract must be determined by the intent of the parties, where an agreement to furnish funds to acquire and improve real estate, and for sale of stock in the corporation to be formed, could not be performed in one year even by excluding the acts required of the new corporation, the agreement was not one to be performed within one year and to be enforceable must be in writing, in view of Burns' Ann. St. 1914, § 7462.—Meyer v. E. G. Spink Co., Ind., 124 N. E. 757.

26. **Fraud**—Proximate Cause.—To recover for fraud, it is not necessary that the party injured relied solely on the misrepresentations in changing his situation; it is sufficient if the misrepresentation was one of the effective causes of the change of situation.—Bledsoe v. Letson, Mo., 215 S. W. 513.

27. **Fraudulent Conveyances**—Bulk Sales Act.—Goods and fixtures used in a restaurant conducted on the ordinary plan is not a "stock of merchandise" within the meaning of the Bulk Sales Act; such words being used in their common and ordinary acceptation, and meaning the goods or chattels which a merchant holds for sale, being equivalent to "stock in trade."—Swift & Co. v. Tempelos, N. C., 101 S. E. 8.

28.——Participant in Fraud.—In order to defeat a transfer which has been made with the intent to defraud creditors, it is not necessary to show that the transferee was an actual participant in the fraud of the grantor.—Burnwell Coal Co. v. Setzer, Ala., 83 So. 139.

29.——Preference.—An insolvent debtor may prefer a bona fide creditor by making an assignment of the proceeds of an insurance policy to such creditor, where the creditor's claim is an amount equal to the fund transferred.—Cavanaugh v. Dyer, Mo., 215 S. W. 481.

30. **Good Will**—Trade Name.—A person has a property interest in his trade name and good will, and, even in the absence of a statute, will be protected against injury to that trade name and good will.—Robert H. Ingersoll & Bro. v. Hahne & Co., N. J., 108 Atl. 128.

31. **Guaranty** — Consideration Imported. — Where the guaranty of a note was in writing, the writing itself imports a consideration.—Security Commercial & Savings Bank of San Diego v. Seitz, Cal., 185 Pac. 188.

32. **Husband and Wife**—Adverse Possession.—Plaintiff, who did not go into possession of defendant's land until after defendant's marriage, could not, by reason of such possession while defendant was under coverture, acquire title by adverse possession; the statute not having run during such period.—Nichols v. Miller, Va., 101 S. E. 68.

33.——Estoppel.—Where a married woman allowed her husband to hold title to property in which she had the beneficial interest, and the husband before indorsing a note informed complainant that the property to which he held title belonged to his wife, held, that the wife is not estopped as against complainant to assert her interest.—Wood v. Lester, Va., 101 S. E. 52.

34. **Injunction**—Placarding Business Place.—Acts of union men in maintaining placards in proximity to complainant machine company's plant reading: "Don't scab. Honest jobs are plenty. Strike at * * * machine company"—in distributing like cards to prospective employes, etc., held illegal, and subject to injunction at the suit of the company.—Thomson Mach. Co. v. Brown, N. J., 108 Atl. 116.

35. **Insurance**—Accidental Injury.—Where insured, who was employed to select and separate unmarketable from marketable oranges, ate three of them, resulting in gastritis, which

shortly caused his death, the death was not by "accidental means," within the provisions of the policy, although the result was accidental.—Martin v. Interstate Business Men's Acc. Ass'n, Ia., 174 N. W. 577.

36.——Cancellation by Mail.—If a notice of cancellation is mailed to assured at his latest address appearing on the company's record, with check for unearned premium, that is sufficient; the assured assuming the risk of due receipt of the notice.—Wolonter v. U. S. Casualty Co., Va., 101 S. E. 58.

37.——Total Disability.—A nurse who became afflicted with a disease, known as subacute congestion of the conjunctiva, accompanied with iritic irritation and eczema of the eyes and eyelids, which calls for exclusion of light from the eyes and exercise in the open and fresh air, was not "totally disabled and confined within the house," within the meaning of an accident and sickness policy, having gone from place to place for change of air, etc.—Bucher v. Great Eastern Casualty Co., Mo., 215 S. W. 494.

38.——Waiver of Forfeiture.—Where monthly premiums on a benefit certificate are collected and retained by insurer month after month, and the certificate continued in force, the insurer thereby itself and not by its local agents and collectors, waives the forfeiture provision for nonpayment of premium.—Knights of the Maccabees of the World v. Johnson, Okla., 185 Pac. 82.

39. **Intoxicating Liquors**—Action on Bond.—The basis of an action on a liquor bond sounds in tort, and the tort-feasor rule applies.—Brown v. Kemp, Ind., 124 N. E. 777.

40. **Judgment**—General Jurisdiction.—Where record of judgment of domestic court of superior and general jurisdiction is merely silent upon any particular matter affecting jurisdiction, it will be presumed, notwithstanding, that whatever ought to have been done was not only done, but that it was rightly done.—Louisville & N. R. Co. v. Tally, Ala., 83 So. 114.

41.——Verity Implied.—Estoppel arises from the record of a judgment when considered as a memorial or entry of the judgment and when considered as a judgment; the record importing absolute verity impeachable by no one, and the judgment having the effect of precluding a reexamination, by the parties thereto and their privies, into the truth of the matters decided.—Price v. Edwards, N. C., 101 S. E. 33.

42. **Kidnapping**—Physical Force.—To constitute the offense of kidnapping, it is not necessary that actual physical force should have been employed; it only being essential that the taking or detention be against the will of the person kidnapped.—State v. Marks, N. C., 101 S. E. 24.

43. **Landlord and Tenant**—Annual Crops.—A tenant is entitled, as against the landlord and his successors to the annual crops raised on the land during the tenancy, and as between them such crops are not a part of the freehold, but the property of the tenant in the absence of contrary stipulation.—Estep v. Bailey, Ore., 185 Pac. 227.

44.——Change in Law.—A lease, lawful when made, does not become unlawful by a subsequent change in the law, though such change may under certain circumstances destroy the contract obligation.—Coklin v. Silver, Ia., 174 N. W. 573.

45.——Practical Construction.—In cases where parties have put a consideration upon a lease, especially in cases of doubt, that construction will be applied to the instrument by the courts.—Ohio Oil Co. v. Burch, Ind., 124 N. E. 781.

46.——Tenancy at Will.—The holding of a tenant at will may become one for a year, if it may be inferred that such is the parties' intention, and payment of an aliquot part of the yearly rent, without contrary explanation, is sufficient evidence of such intention.—Siemers v. Huechel, N. Y., 178 N. Y. S. 649.

47.——Quiet Enjoyment.—No acts of molestation, even if committed by the landlord himself or by a servant at his command, amount to a breach of a covenant to quiet enjoyment unless they are more than a mere trespass.—North Pac. S. S. Co. v. Terminal Inv. Co., Cal., 185 Pac. 205.

48. **Libel and Slander**—Voluntary Testimony.—Where a witness while on stand makes a "voluntary statement," one not given in reply to a question asked him, he is entitled to absolute privilege with respect to it, and, regardless of his motive, is not answerable in an action for slander, if the statement was pertinent to the issues being tried.—Weil v. Lynds, Kan., 185 Pac. 51.

49. **Malicious Prosecution**—Probable Cause.—In a malicious prosecution case "probable cause" is a reasonable ground for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that defendant is guilty of the offense charged.—Parisian Co. v. Williams, Ala., 83 So. 122.

50. **Marriage**—Annulment. — Where plaintiff was 17 years of age, when she married without the consent of her parents, she may have the marriage annulled, where it was never consummated and she and her husband separated immediately after the ceremony, unless she is guilty of laches.—Price v. Price, N. Y., 178 N. Y. S. 561.

51.——Annulment.—In an action to annul a marriage on ground that the wife was an epileptic at time of marriage, proof that she was then an epileptic, in absence of a showing of fraud in concealing her condition, is not sufficient to warrant a decree.—Behsman v. Behsman, Minn., 174 N. W. 611.

52. **Master and Servant**—Assurance by Master.—An employe is not chargeable as a matter of law with contributory negligence merely because, before notifying master, he feared the possibility of injury from circumstances coming to his own knowledge, where he afterwards relied on master's assurance that work might be safely performed.—Fletcher v. Henry Baden Mercantile Co., Kan., 185 Pac. 7.

53.——Defective Coupling.—A railroad company cannot be held liable for a trainman's injuries by a defective coupling, where there is no showing the defect was known, or could have been known, by it in time to have made repairs.—Hunsaker's Adm'x v. Chesapeake & O. Ry. Co., Ky., 215 S. W. 552.

54.——Imputability. — Negligence of servants in the course of their employment is to be imputed to their master.—Fahey v. Niles, Del., 108 Atl. 135.

55.——Tools and Appliances.—The tools and appliances adopted by the master must be reasonably safe to do the work required of them and for which purpose they are used.—Davis v. Ball., Okla., 185 Pac. 105.

56.——Workmen's Compensation Act. — That employe performed his duties in an unusual and dangerous manner does not of itself place him outside of provisions of Workmen's Compensation Act.—Industrial Commission of Colorado v. H. Koppers Co., Colo., 185 Pac. 267.

57. **Mechanics**—Nonlienable Items. — A claim for mechanic's lien will not be sustained where it appears that the claimant in bad faith, or with a recklessness tantamount thereto, has included in his statement items which he knows, or ought to know, are nonlienable.—Stephenson & Peterson v. Svenson, Ia., 174 N. W. 570.

58. **Monopolies**—Interstate Commerce. — A conspiracy to restrain interstate or foreign commerce, in violation of Sherman Anti-Trust Act, July 2, 1890, is proved by proving the forbidden meeting of minds, like a common law conspiracy, and proof of an overt act is not essential.—Lamar v. U. S., U. S. C. C. A., 260 Fed. 561.

59. **Mortgages**—Future Advances.—In an action to foreclose a mortgage securing a note given to cover future advances, the burden of proof rests upon the plaintiff to establish the amount of money advanced to the defendant.—Graber v. Boswell, Ore., 185 Pac. 231.

60. **Municipal Corporations** — Constructive Knowledge.—The rule of constructive knowledge applies only to such defects in a sidewalk as might have been discovered by ordinary care and diligence.—City of New Albany v. Slattery, Ind., 124 N. E. 755.

61.——Respondeat Superior. — Though city's employes were negligent in kindling or guarding fire on city dumping ground and sparks set fire to house of plaintiff's intestate, the city is not liable; the doctrine of respondeat superior not applying to municipalities.—Reilly v. City of New Brunswick, N. J., 108 Atl. 107.

62.——Street Obstruction.—When an obstruction is rightfully placed in a street, the party placing it must take due precaution not to injure any person lawfully using the street for public travel.—Bailey v. Columbia Grocery Co., Ind., 124 N. E. 784.

63.——Speed Regulations.—Defendant's driving of his automobile at a rate of speed in excess of 25 miles an hour within the business part of the city of Springfield could properly be found to have been greater than was reasonable and proper, having regard to the use of the way and the safety of the public.—Buoniconti v. Lee, Mass., 124 N. E. 791.

64. **Partition**—Complete Relief.—A court of equity, having jurisdiction of the subject-matter and of the parties for the primary purpose of a sale for distribution among joint tenants, will retain and exercise such jurisdiction to give complete relief to a cotenant who has another interest in the land.—Winsett v. Winsett, Ala., 83 So. 117.

65.——Equity.—The action of partition is in the nature of a chancery action, cognizable under equity powers.—Knight v. Harrison, N. D., 174 N. W. 632.

66. **Patents**—Abandonment.—Where the use of a device exhibited at a world's fair was only experimental, and tests then made were unsuccessful, there was no public use or sale, constituting an abandonment, so as to invalidate a patent application made over two years later.—Alvey-Ferguson Co. v. John F. Trommer Evergreen Brewery, U. S. D. C., 260 Fed. 572.

67. **Payment**—Receipt.—A receipt is not a contract, but a mere admission in writing of the fact of payment or other settlement between debtor and creditor, and under Civ. Code 1910, § 5795, is only prima facie evidence of payment, subject to explanation.—Hamlin v. Lupo, Ga., 101 S. E. 5.

68. **Quieting Title**—Cloud on Title.—Judgment lien claimant may sue to remove a cloud on the title to the property.—Robben v. Benson, Cal., 185 Pac. 200.

69. **Railroads**—Crossing. — Where one has ample time to cross a railroad at a crossing in proper condition, and the engine of his automobile chokes and the machine stops on the track, the proximate cause of the collision is the stopping, and the railroad company is not negligent in not assuming the engine would stop provided trainmen, on discovering that it had stopped, did everything in their power to stop the train.—Louisville & N. R. Co. v. Harrison, Fla., 83 So. 89.

70. **Release**—Mutual Mistake. — A release given by an injured railway mail clerk to the railroad whose negligence caused his injuries, can be said to have been given under "mutual mistake of fact" only when the clerk did not anticipate his injuries would later cause the development of spinal meningitis and his death, while the railroad, through its claim agent, also did not anticipate such facts.—Miles v. New York Cent. R. Co., N. Y., 178 N. Y. S. 637.

71. **Reformation of Instruments** — Mutual Mistake.—In order to justify a decree for reformation in cases of pure mistake, it is necessary that mistake should have been mutual.—Long v. U. S. Fidelity & Guaranty Co., N. C., 101 S. E. 11.

72.——Mutual Mistake.—Where a condition was omitted through mutual mistake from a contract of sale of land, the contract could be reformed so that the condition would be included therein.—Gray v. Van Gordon, Ia., 174 N. W. 588.

73. **Sales**—Inspection.—Where buyer inspected onions when he purchased them, he was not entitled to again inspect them, in the absence of a claim that seller attempted to deliver other onions.—Naftzger v. Henneman, Ore., 185 Pac. 233.

74.——Nullity.—A contract of sale vitiated by fraud is voidable ab initio at the election of the innocent buyer, who, having taken proper steps to avoid it, may treat it as a nullity and bring action at law where the legal remedy is adequate, in which action he is required to establish the fraud and to show that he promptly took proper steps in avoidance.—Farrell v. Hunt, Ind., 124 N. E. 745.

75.——Performance Prevented.—Seller, having contracted to make deliveries of woolen goods, was not relieved from liability for failure to so do by fact that United States government had preempted practically the entire woolen goods supply on account of war.—Salembier, Levin & Co. v. North Adams Mfg. Co., N. Y., 178 N. Y. S. 607.

76.——Tender.—When one party to a contract notifies the other party that he elects to breach the contract, other party need not make tender, since tender would be an idle performance.—Clinton Oil & Mfg. Co. v. Carpenter, S. C., 101 S. E. 47.

77. **Set-Off and Counterclaim**—Equity.—The general rule is as regards set-offs that equity follows the law.—Edelman v. Schwartz, N. Y., 178 N. Y. S. 587.

78. **Specific Performance**—Judicial Discretion. —Though the right to specific performance of a contract to sell and convey land is not absolute, but a matter of discretion with the chancellor, the discretion is a sound judicial discretion, controlled by established principles of equity, and where the contract is in writing, is certain, for value, fair and just, and capable of being enforced without hardship, specific performance will be decreed as a matter of course.—Sims v. Best, Ark., 215 S. W. 519.

79.——Tender of Performance.—The court cannot decree specific performance by the seller of a contract for the sale of land, where the buyer's assignee, who asks relief, has not specifically performed and does not tender performance in full, but simply expresses its willingness.—Smith v. Martin, Ore., 185 Pac. 236.

80. **Statutes**—Retrospective.—While ordinarily a statute will not be construed so as to give it a retroactive operation, unless its language either expressly or by implication requires it to be so construed, the rule does not apply to remedial statutes, or those extending benefits, where vested or constitutional rights are not affected. —People ex rel. Gabriel v. Warden of New York County Penitentiary, Wards Island, N. Y., 178 N. Y. S. 595.

81. **Trusts**—Mingling Funds. — The rule charging a trustee who mingles trust funds with his own as trustee of all mingled funds does not apply where two persons knowingly mingle their own funds, especially where the two are man and wife.—Agnew v. Agnew, Colo., 185 Pac. 259.

82. **Usury**—Legal Rate.—A contract for the legal rate of interest during the time of forbearance, and for interest upon interest thereafter, is not usurious.—Shear Co. v. Hall, Tex., 215 S. W. 567.

83. **Warehousemen**—Restoring Property. — A storage company which was negligent in the care of property left with it was liable only for the expense of restoration or repair, if such cost was reasonable.—Herrick v. Merchants' Transfer & Storage Co., Ia., 174 N. W. 569.

84. **Waters and Water Courses**—Prescription.—Landowners who used all the waters of a natural stream continuously, openly, and under a claim of right for at least five years, paying taxes, acquired title by prescription.—Turner v. Bush, Cal., 185 Pac. 190.

85. **Wills**—Election.—That a widow has obtained an allowance out of her deceased husband's estate in the probate court on the asserted ground that she was a beneficiary under his will, under which she had elected to take, precludes her from subsequently maintaining an action to set aside the election.—West v. West, Kan., 185 Pac. 4.

86.——Probate.—If a testator comprehends and approves the instrument as written, it should not be refused probate because it fails to carry out his intention as to part of his property.—In re Knutson's Estate, Minn., 174 N. W. 617.